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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. EDUARDO BARAJAS BARRAGAN, Defendant and Appellant.	2d Crim. No. B290731 (Super. Ct. No. 1504428) (Santa Barbara County)

Eduardo Barajas Barragan appeals a judgment following conviction of six counts of sexual intercourse with a child 10 years of age or younger, and seven counts of child molestation with a child under the age of 14 years. (Pen. Code, §§ 288.7, subd. (a), 288, subd. (a).)[1]

This appeal concerns sexual acts that Barragan committed against his stepdaughter Jane Doe over the course of five years. During a post-arrest interview with a police detective, Barragan

[1] All statutory references are to the Penal Code unless otherwise stated.

conceded that "[t]emptation beat [him]," and stated that Jane Doe "assented to everything" and "liked it." On appeal, Barragan raises issues regarding information amendment, alleged propensity evidence, and sentencing. We reject his contentions and affirm.

FACTUAL AND PROCEDURAL HISTORY

Jane Doe lived with her mother and stepfather Barragan in a two-bedroom house in Santa Barbara County. Jane Doe's mother and Barragan had two children together, one of whom had a chronic illness requiring occasional hospitalization. When Jane Doe was eight years old, Barragan had sexual intercourse with her. Between employment and caring for her other children, Jane Doe's mother was frequently absent from the household.

Jane Doe testified that Barragan raped her "[l]ike every day" when she was eight years old, continuing until she turned 13 years old. When Jane Doe was in the sixth grade, Barragan orally copulated her and forced her to orally copulate him. At times, Jane Doe would protest or physically resist Barragan, but she usually "froze" and submitted.

Jane Doe did not inform her mother because she feared that Barragan would hurt her mother or the other children; she also feared Barragan might abandon them.

During the early morning of December 12, 2016, Jane Doe's mother awoke and noticed Barragan was not in the bed. She heard noises from the other bedroom that sounded like a bed "moving." Jane Doe's mother walked to the other bedroom and saw Barragan standing beside Jane Doe. Jane Doe testified that Barragan had removed his pants and her pants and had already raped her once that night. She also stated that she was relieved when her mother interrupted because she then realized that intercourse would not "happen again."

Jane Doe then informed her mother that Barragan had sexually abused her since she was eight years old. Jane Doe's mother later spoke with Barragan who admitted that he had raped Jane Doe and that Jane Doe's complaints of long-standing sexual abuse were true. The following day, however, Barragan informed Jane Doe's mother that the most recent intercourse with Jane Doe was "the first time" and that he "wasn't going to end up in jail."

On December 13, 2016, Jane Doe's mother complained to a social worker regarding Jane Doe's sexual abuse. Santa Maria Police Officers Seth Hall and Ernest Salinas and a social worker responded to the complaint. Salinas asked Barragan if he knew why they were there; Barragan responded: "Yes. . . . I was having sexual intercourse with [Jane Doe]."

Following Barragan's arrest and waiver of rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436, Santa Maria Detective Jose DeLeija interviewed Barragan. The interview was videotaped and presented into evidence at trial. In the interview, Barragan stated that he had sexual intercourse with Jane Doe when she was eight years old and that "she assented to everything." Barragan admitted that he performed acts of oral copulation on Jane Doe and stated that she reciprocated because she "liked it." Barragan explained that he viewed Jane Doe "as [his] wife" and "as a woman." Barragan specifically admitted to acts of oral copulation as well as sexual intercourse in the early morning of December 12, 2016, and stated that at Jane Doe's request, he intended to commit a second act of intercourse. Barragan also admitted to acts of intercourse several times a week since Jane Doe was eight years old.

Barragan admitted that he saw pornography occasionally on his cellular telephone but that the telephone could not play

videos. He also stated that the pornography involved actors 18 years old and older, but not children.

The jury convicted Barragan of six counts of sexual intercourse with a child 10 years of age or younger, and seven counts of child molestation with a child under the age of 14 years. (§§ 288.7, subd. (a), 288, subd. (a).) The trial court sentenced him to a prison term of 20 years plus 150 years to life. The court imposed a $10,000 restitution fine, a $10,000 parole revocation restitution fine (suspended), a $520 court operations assessment, and a $390 court facilities assessment. (§§ 1202.4, subd. (b), 1202.45, 1465.8, subd. (a); Gov. Code, § 70373.) It also ordered victim restitution and awarded Barragan 619 days of presentence custody credit.

Barragan appeals and contends that the trial court erred by: 1) permitting the prosecution to amend the information following presentation of the prosecution case; 2) permitting evidence of his viewing of adult and child pornography; 3) imposing a sentence that constitutes cruel and unusual punishment; and 4) imposing fines and assessments without inquiring sua sponte into his ability to pay. Barragan asserts that these errors constitute prejudicial federal and state constitutional error.

DISCUSSION

I.

Barragan argues that the trial court abused its discretion by allowing the prosecution to further amend the felony information following presentation of its case-in-chief. He asserts that the amendment prejudiced his defense and violated his federal and state constitutional rights to due process of law and to a fair trial.

The second amended felony information alleged that Barragan raped Jane Doe when she was eight years old (counts 1 & 2), nine years old (counts 3 & 4), and 10 years old (counts 5 & 6). Jane Doe informed her mother and the sexual assault examination nurse that the rapes began when she was eight years old; at trial, she testified that the rapes began when she was 10 years old. At the prosecutor's request, the trial court permitted the second amended felony information to be further amended to allege that counts 1 through 6 occurred when Jane Doe was 10 years old, ruling that "it seems to make common sense to allow that." Barragan objected that he was prejudiced by the amendment because he "would have pursued a different [cross-examination] strategy." Counsel stated: "My strategy [had been] not to focus as much on age ten."

Section 1009 authorizes the trial court to permit amendment of an information at any stage of the proceedings. (*People v. Hamernik* (2016) 1 Cal.App.5th 412, 424.) The amendment may not change, however, the offense charged to one not shown by evidence at the preliminary examination. (*Ibid.*) If the substantial rights of the defendant are prejudiced by the amendment, the trial court may grant a reasonable postponement of the proceedings. (*Ibid.*)

Due process of law requires that an accused be advised of the charges against him to prepare and present his defense and not be taken by surprise. (*People v. Hamernik*, *supra*, 1 Cal.App.5th 412, 426.) Thus, a defendant may not be prosecuted for an offense not shown by the evidence at the preliminary examination. (*People v. Graff* (2009) 170 Cal.App.4th 345, 360.) "So long as the evidence presented at the preliminary hearing supports the number of offenses charged against defendant and covers the timeframe(s) charged in the information, a defendant

has all the notice the Constitution requires." (*People v. Jeff* (1988) 204 Cal.App.3d 309, 342 [time, place, and circumstances of the charged offenses are left to the preliminary examination transcript].)

Here, evidence at the preliminary examination established that Jane Doe informed a forensic interviewer that Barragan began raping her when she was eight years old and that it occurred every day. In his police interview, Barragan admitted that "it all started" when Jane Doe was eight years old. The sexual abuse occurred several times a week. Jane Doe's generic complaints were sufficient to place Barragan on notice; she described the type of sexual acts committed, the number of acts committed with sufficient certainty to support each count alleged in the information, and the general time period in which the acts occurred. (*People v. Jones* (1990) 51 Cal.3d 294, 314, 318 [prosecution of child molestation charges based on generic testimony does not deny defendant fair notice of the charges against him].) For this reason, the trial court did not abuse its discretion by permitting the third amended information.

Barragan also did not establish that he was prejudiced by the filing of the third amended information. Evidence at the preliminary examination established that Barragan raped Jane Doe when she was eight years old and the acts continued until she turned 13 years old. The amendment narrowed the time frame and eliminated the allegations of sexual abuse when Jane Doe was eight and nine years old. Under either the second amended information or the third amended information, Barragan must defend against sexual acts committed against Jane Doe when she was 10 years old. Barragan thus had the same motivation to cross-examine Jane Doe under either version of the information. Moreover, Barragan did not request a

continuance or postponement to meet the now-narrowed charges. The trial court did not abuse its discretion by concluding that Barragan did not suffer prejudice from allowing the third amended information.

II.[2]

Barragan contends that the trial court abused its discretion by permitting evidence that he viewed adult pornography and attempted to view child pornography on his telephone. This evidence was presented by the videotaped police interview and by the questioning of prosecution witnesses. It also was argued during summation. Barragan asserts that the evidence is irrelevant, unduly prejudicial, and its admission violates his federal and state constitutional rights to due process of law, a fair trial, and an impartial jury.

During the police interview, Barragan stated that he viewed pornography on his telephone "once in a while," but not child pornography. He then added that he "[s]ometimes" watched a video but only if the actors were 18 years old. Barragan stated that he attempted to watch child pornography but the Internet access did not permit it. He also admitted that he watched pornography before initially molesting Jane Doe, confirming to the detective that "[he] already had something in [his] mind" before molesting her.

Prior to trial, Barragan objected to evidence that he attempted to view child pornography as irrelevant and unduly prejudicial. He did not object to the evidence that he viewed adult pornography.

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[2] All statutory references in Part II are to the Evidence Code.

Section 1101, subdivision (a) sets forth the "strongly entrenched" rule that propensity evidence is not admissible to establish a defendant's conduct on a specific occasion. (*People v. Erskine* (2019) 7 Cal.5th 279, 295.) Section 1101, subdivision (b) permits evidence of misconduct, however, when offered as evidence of a defendant's motive, common scheme or plan, intent, or absence of mistake, among other reasons. (*Erskine*, at p. 295.) Degree of similarity of criminal acts is important; the least degree of similarity is required to establish a defendant's intent. (*Ibid.*) The reoccurrence of a similar result tends to negative accident, inadvertence, or other innocent mental state, and tends to establish criminal intent. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402, superseded by statute as stated in *People v. Robertson* (2012) 208 Cal.App.4th 965, 991.)

Section 352 sets forth the general rule that the trial court possesses discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create a substantial danger of undue prejudice, confusing the issues, or misleading the jury. (*People v. Erskine*, *supra*, 7 Cal.5th 279, 296.) The court's ruling admitting evidence pursuant to sections 1101 and 352 is reviewed for an abuse of discretion. (*Erskine*, at p. 296.)

The trial court did not abuse its discretion by permitting evidence that Barragan attempted to view child pornography. Evidence of his attempt was relevant to prove his criminal intent to gratify his sexual desires. (*People v. Memro* (1995) 11 Cal.4th 786, 864-865 [evidence that defendant possessed photographs of nude boys relevant evidence from which jury could infer that defendant had a sexual attraction to young boys and intended to act on that attraction], overruled on other grounds by *People v.*

Gaines (2009) 46 Cal.4th 172, 181, fn. 2.) Barragan's intent was in issue because he pleaded not guilty to the charged crimes. (*Id.* at p. 864.) He confirmed that he "already had something in [his] mind" by attempting to view child pornography prior to raping his stepdaughter. Barragan's attempt to access child pornography is "probative of [his] molestation crimes . . . demonstrat[ing] his intent to gratify his prurient desires with children." (*People v. Snyder* (2016) 1 Cal.App.5th 622, 634.)

Evidence of Barragan's statements was more probative than unduly prejudicial. The prosecutor did not present physical evidence of child pornography. (See *People v. Snyder*, *supra*, 1 Cal.App.5th 622, 634 [100 photographs of children and adults in stages of undress and sexual activity not unduly prejudicial].) Moreover, the evidence was far less inflammatory than the evidence that Barragan committed acts of sexual intercourse and oral copulation with his stepdaughter for five years. (*People v. Erskine*, *supra*, 7 Cal.5th 279, 297 [charged crimes involved more inflammatory conduct than prior misconduct]; *People v. Eubanks* (2011) 53 Cal.4th 110, 144 [potential for prejudice decreased if other acts evidence is no stronger or no more inflammatory than evidence of charged offenses].)

Barragan failed to request a limiting instruction (CALCRIM No. 375) regarding use of this evidence. The trial court was not required to instruct sua sponte with this instruction. (*People v. Hinton* (2006) 37 Cal.4th 839, 875-876; *People v. Collie* (1981) 30 Cal.3d 43, 64 [trial court required to instruct sua sponte with CALCRIM No. 375 only in the "occasional extraordinary case" in which the evidence of prior misconduct is a dominant part of the evidence against the accused and is highly prejudicial and minimally relevant].)

Barragan has forfeited any claim on appeal regarding his viewing of adult pornography. (§ 353, subd. (a) [claim for erroneous admission of evidence requires clear and specific objection].) Forfeiture aside, any error would be harmless pursuant to any standard of review.

III.

Barragan argues that his 20 years plus 150-years-to-life sentence violates the constitutional commands against cruel and unusual punishment pursuant to the United States and California Constitutions. (U.S. Const., 8th Amend.; Cal Const., art. I, § 17.) He points out that he has an insignificant criminal record, was employed full time, and had but a single victim. Barragan asserts that his sentence is equivalent to life without parole and contends that he deserves an opportunity for release and rehabilitation.

Barragan has forfeited this issue because he did not raise this claim in the trial court. (*People v. Baker* (2018) 20 Cal.App.5th 711, 720 [cruel and unusual punishment claim is fact specific and forfeited if not raised in the trial court]; *People v. Johnson* (2013) 221 Cal.App.4th 623, 636 [forfeiture of cruel and unusual punishment claim].) Nevertheless, we reach the merits of Barragan's argument pursuant to relevant constitutional standards to prevent the inevitable ineffectiveness-of-counsel claim. (*People v. Em* (2009) 171 Cal.App.4th 964, 971, fn. 5.)

In reviewing a cruel and unusual punishment claim, we examine whether a punishment is grossly disproportionate to the crime for Eighth Amendment purposes. (*People v. Johnson*, *supra*, 221 Cal.App.4th 623, 636.) For purposes of the California Constitution, a sentence is cruel or unusual if it is so disproportionate to the crime committed that it shocks the

conscience and offends fundamental notions of human dignity. (*Ibid.*)

Fixing the penalty for crimes is the exclusive province of the Legislature, which is in the best position to evaluate the gravity of different crimes and to make judgments among penological approaches. (*People v. Martinez* (1999) 76 Cal.App.4th 489, 494.) Reviewing courts should grant substantial deference to the broad legislative authority to determine the types and limits of punishments for crimes. (*People v. Reyes* (2016) 246 Cal.App.4th 62, 83.) Only in a rare case could a court declare that the length of a sentence mandated by the Legislature is constitutionally excessive. (*Ibid.*)

Barragan's sentence is not disproportionate pursuant to our Supreme Court's holding in *People v. Dillon* (1983) 34 Cal.3d 441, 479. Dillon, an immature youth, panicked and killed a guard at a marijuana farm, where he and his friends had planned to steal marijuana. (*Id.* at pp. 451-452.) Our Supreme Court found Dillon's life sentence for murder excessive, considering his immaturity and moral culpability. (*Id.* at pp. 482-483, 488.) The successful disproportionality analysis in *Dillon,* however, is an exception and an "exquisite rarity." (*People v. Weddle* (1991) 1 Cal.App.4th 1190, 1196.) A defendant must overcome a "considerable burden" to demonstrate that his sentence is disproportionate to his level of culpability. (*People v. Wingo* (1975) 14 Cal.3d 169, 174, superseded on other grounds by section 1170.) Unlike Dillon, Barragan is a mature adult, not an immature and panicked youth who was responding to a perceived immediate danger.

Barragan's sentence also is not grossly disproportionate to his crime for Eighth Amendment purposes. (*Rummel v. Estelle* (1980) 445 U.S. 263, 284-285 [life sentence for three nonviolent

crimes is constitutional]; *Harmelin v. Michigan* (1991) 501 U.S. 957, 1004 [life without possibility of parole for possession of 650 grams or more of cocaine is constitutional].) Moreover, disproportionality has little or no relevance in non-capital cases. (*Harmelin*, at p. 965.)

An insignificant criminal record is "far from determinative" when the seriousness of the crime and the circumstances surrounding its commission substantially outweigh these factors. (*People v. Szadziewicz* (2008) 161 Cal.App.4th 823, 845, overruled in part by *People v. Dalton* (2019) 7 Cal.5th 166, 214.) "[G]reat deference is ordinarily paid to legislation designed to protect children, who all too frequently are helpless victims of sexual offenses." (*In re Wells* (1975) 46 Cal.App.3d 592, 599.)

Here, Barragan abused a position of trust and committed many sexual offenses over a long period against a child less than 10 years old who considered him a father figure. It matters not that Barragan did not inflict physical violence upon his stepdaughter; his crimes have inflicted permanent psychological damage. As set forth in the probation report, Barragan continues to maintain that Jane Doe was a willing participant. In sentencing Barragan, the trial judge stated that the case was "one of the most serious and sad cases [he had] heard." The sentence imposed, although significant, is not "so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424.)

IV.

Barragan contends that the trial court failed to determine his ability to pay before imposing fines and assessments at sentencing. He asserts that he has been denied due process of law and is entitled to a hearing to determine his ability to pay.

Barragan relies upon *People v. Dueñas* (2019) 30 Cal.App.5th 1157. In *Dueñas,* the court held that imposing assessments pursuant to section 1465.8, subdivision (a) (court operations) and Government Code section 70373 (court facilities funding) without a hearing on the defendant's ability to pay violates due process of law pursuant to the federal and state constitutions. (*Dueñas,* at p. 1168.) Neither statute expressly prohibits the trial court from considering the defendant's ability to pay. Pursuant to section 1202.4, subdivisions (b)(1) and (c), the court is expressly prohibited from considering the defendant's ability to pay in imposing a restitution fine unless the fine imposed exceeds $300. *Duenas* held that the court must stay execution of the restitution fine unless or until the prosecutor demonstrates that the defendant has the ability to pay. (*Id.* at p. 1172.)

Here, the trial court imposed a $520 assessment pursuant to section 1465.8, subdivision (a), a $390 assessment pursuant to Government Code 70373, and a $10,000 restitution fine pursuant to section 1202.4, subdivision (b). The court also imposed and suspended a $10,000 parole revocation restitution fine. (§ 1202.45.)

Barragan did not object to these financial penalties in the trial court. His failure to challenge the assessments and fines imposed at sentencing precludes doing so on appeal. (*People v. Aguilar* (2015) 60 Cal.4th 862, 864 [challenge to probation-related costs and fees paid to trial counsel].) In *People v. Castellano* (2019) 33 Cal.App.5th 485, the court excused the defendant's failure to raise the issue in the trial court. *Castellano* reasoned that the defendant's challenge is based on a newly announced constitutional principle that could not have been reasonably anticipated at the time of trial. (*Id.* at p. 489.) *People*

v. Frandsen (2019) 33 Cal.App.5th 1126 reached a different conclusion. (*Id.* at p. 1155 ["traditional and prudential virtue" requires parties to raise issue in the trial court prior to seeking appellate review].)

It is understandable that trial counsel representing criminal defendants in cases prior to *Dueñas* were more concerned with issues of guilt and sentencing than in court assessments and restitution fines, particularly in the case before us with a probation-recommended maximum sentence of 20 years plus 150 years to life.

Nevertheless, as *Frandsen* points out, although this issue may have been slowly simmering on the backburner, it was there to be raised. Barragan has forfeited this argument. (*People v. Avila* (2009) 46 Cal.4th 680, 729 [defendant forfeits issue by failing to object to imposition of restitution fine based on inability to pay]; *People v. Gutierrez* (2019) 35 Cal.App.5th 1027, 1033 [forfeiture of ability-to-pay argument by failure to object], petn. for review filed July 18, 2019.) "Given that the defendant is in the best position to know whether he has the ability to pay, it is incumbent on him to object to the fine and demonstrate why it should not be imposed." (*People v. Frandsen*, *supra*, 33 Cal.App.5th 1126, 1154.)

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J. PERREN, J.

James K. Voysey, Judge

Superior Court County of Santa Barbara

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